91-695

No. _____

IN THE

Supreme Court of the United States

October Term, 1991

ISAIAH THOMPSON,
Petitioner,

vs.

JANINE THOMPSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution proscribes *quid pro quo* sexual harassment that is alleged to be directed at a single individual by reason of that individual's personal characteristics rather than her membership in a class, *i.e.*, females.

2. Whether an exception to Rule 51 of the Federal Rules of Civil Procedure requiring an objection to a jury instruction in order to preserve an issue for appeal is warranted where the trial court has dealt extensively with the issue presented for appeal and it would have been impossible to correct the error if an objection had been interposed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Isaiah Thompson, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 7, 1991 (motion for rehearing and suggestion of rehearing *en banc* denied July 30, 1991).

OPINIONS BELOW

The following court rulings are found in the Appendix:

1. Opinion and Order of the United States District Court for the Southern District of Ohio, Eastern Division, filed June 8, 1988, granting motion for summary judgment;

2. Special Verdict of the United States District Court for the Southern District of Ohio, Eastern Division, filed December 7, 1989, finding against Petitioner;

3. Judgment Entry of the United States District Court for the Southern District of Ohio, Eastern Division, filed December 8, 1989, rendering judgment against Petitioner;

4. Opinion and Order of the United States District Court for the Southern District of Ohio, Eastern Division, filed March 13, 1991, denying Petitioner's motion for judgment notwithstanding the verdict or new trial;

5. Opinion of the United States Court of Appeals for the Sixth Circuit filed June 7, 1991, affirming District Court's judgment;

6. Order of the United States Court of Appeals for the Sixth Circuit filed July 30, 1991, denying petition for rehearing.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 7, 1991. Petitioner sought a rehearing which was denied by the Sixth Circuit on July 30, 1991. Petitioner then filed a motion for a stay of mandate pending the filing of a Petition for a Writ of Certiorari with the United States Supreme Court. This petition has been timely submitted. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The first question presented raises the issue concerning the proof required to support a sexual harassment claim alleged under 42 U.S.C. Section 1983[1] as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution[2] as contrasted to a sexual harassment claim alleged under Title VII.[3]

The second question presented raises the issue as to whether the Court should strictly apply Fed.R. Civ.P. 51: "* * * No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict * * *."

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[1] Every person who under color of any *** subjects, or causes to be subjected any citizen *** to be deprived of any rights *** shall be liable ***."

[2] "*** No State shall make or enforce any law *** nor shall any State deprive any person *** nor deny to any person within its jurisdiction the equal protection of the laws."

[3] "It shall be an unlawful employment practice for an employer (1) to fail or refuse *** or otherwise to discriminate against any individual *** because of such individual's *** sex ***." 42 U.S.C. 2000e-2.

STATEMENT OF THE CASE

Respondent brought suit in 1984 against the Ohio House of Representatives, Representative Isaiah Thompson, and Thomas R. Winters (former Executive Secretary of the Ohio House of Representatives) alleging that she was discriminated against and harassed on the basis of her gender in violation of the Fourteenth Amendment to the United States Constitution, 42 U.S.C. Section 1983, and 42 U.S.C. Section 2000e, *et seq.* She further sought relief for pendent state claims of assault and battery, intentional infliction of emotional distress, and invasion of privacy.

Respondent's Title VII claims did not go to the jury due to a ruling by the trial court that 42 U.S.C. Section 2000e(f) exempted Respondent from Title VII coverage. In connection with its ruling on this issue, the trial court considered the proper scope of a Section 1983 sexual harassment claim. The trial court decided that sexual harassment is a violation of the Equal Protection Clause of the Fourteenth Amendment by reason of the Constitutional right to be free from gender based discrimination.

The Ohio House of Representatives and Thomas Winters were subsequently dismissed from the suit, and the case went to trial solely against Representative Thompson. The jury found that Representative Thompson had subjected Respondent to "*quid pro quo*" sexual harassment in violation of 42 U.S.C. Section 1983. On *all* other claims, *i.e.,* sexual harassment due to a hostile work environment in violation of 42 U.S.C. Section 1983, intentional infliction of emotional distress, intentional invasion of privacy, and battery, the jury found against Respondent and in favor of Representative Thompson.

Representative Thompson filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, which was denied by the trial court by order dated March 13, 1990.

Although the trial court correctly concluded that sexual harassment is proscribed by the Fourteenth Amendment, the court's instruction to the jury concerning Respondent's *quid pro quo* claim was incorrect insofar as it failed to require proof that Petitioner had acted to harass Respondent by reason of her membership in a particular class of citizens. *Trautvetter v. Quick*, 916 F. 2d 1140 (7th Cir. 1990). This error was pointed out on appeal, but the panel determined that failure to specifically object at the time the jury was instructed prohibits review. Petitioner's Petition For Rehearing and Suggestion of Rehearing En Banc was denied July 30, 1991.

The Section 1983 issue raised by this appeal is one of first impression in the Sixth Circuit and there is no United States Supreme Court authority directly on point.

REASONS FOR GRANTING THE WRIT

First Question Presented:

I. The Trial Court Erred As A Matter Of Law In Permitting The Respondent To Proceed With A Claim Of "*Quid Pro Quo*" Sexual Harassment Under 42 U.S.C. Sec. 1983 As Violative Of The Equal Protection Clause Of The Fourteenth Amendment To The United States Constitution.

Respondent originally brought her claim of "*quid pro quo*" sexual harassment under both Title VII and 42 U.S.C. Sec. 1983. The trial court dismissed Respondent's claims under Title VII pursuant to 42 U.S.C. Sec. 2000e(f) (due to her position as a legislative aide), but permitted her to proceed under 42 U.S.C. Sec. 1983, relying upon the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Permitting Respondent to proceed against Representative Thompson under 42 U.S.C. Sec. 1983 on a claim of "*quid pro quo*" sexual harassment constitutes plain error in that such a claim has evolved strictly from the proscriptions set out in Title VII and does not meet the requirements of a constitutional claim pursuant to the Equal Protection Clause.

To establish a claim under 42 U.S.C. Sec. 1983, Respondent was required to prove that Representative Thompson acted under color of state law and that he deprived Respondent of a federal right, constitutional or statutory. *Gomez v. Toledo,* 446 U.S. 635, 640, 64 L.Ed. 2d 572 (1980). The claimed federal right in this case is the right to be free of "*quid pro quo*" sexual harassment as purportedly guranteed by the Equal Protection Clause of the Fourteenth Amendment.

In *Day v. Wayne County Board of Auditors*, 749 F.2d 1199, 1203 (6th Cir. 1984), the issue before the Court was "whether Congress intended to permit resort to Sec. 1983 for violations of Title VII when it adopted the 1972 amendments which made that statute applicable to discrimination in public employment." The Sixth Circuit held that Section 1983 serves as an avenue of redress for constitutional violations or for violations of statutes which protected individuals prior to the enactment of the 1972 amendments, but that Section 1983 was not available for claims which arise pursuant solely to Title VII. *Id.* at 1204-05. Applying this standard, this Court held that Title VII provided the exclusive avenue of redress for a claim of retaliation based upon the filing of previous discrimination charges. *Id.* at 1205.

Case law also makes clear that a party may not use Section 1983 to vindicate a federal statutory right (as contrasted with a constitutional right) if such statute provides its own comprehensive enforcement scheme. *See e.g., Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 20, 69 L. Ed. 2d 435 (1981); *Smith v. Robinson*, 468 U.S. 992, 1009-12, 82 L. Ed. 2d 746 (1984). "Title VII is one of the statutes that may not be bypassed." *Alexander v. Chicago Park District*, 773 F.2d 850, 856 (7th Cir.), *cert. denied*, 474 U.S. 823 (1985) (relying upon *Great American Federal Savings v. Novotny*, 442 U.S. 366, 375-78, 60 L. Ed. 2d 957 (1979)). As was stated by the Fourth Circuit in *Zombro v. Baltimore City Police Department*, 868 F.2d 1364, 1368 (4th Cir. 1989), "A mere assertion that constitutional rights have been somehow infringed does not *ipso facto* defeat the coverage, application and exclusivity of a comprehensive statutory scheme specifically enacted by Congress to redress the alleged violation of rights."

Counsel's research has been unable to locate a single case recognizing a claim of "*quid pro quo*" sexual harassment prior to the time of the enactment of the 1972 amendments to Title VII. Nor does the legislative history of the Equal Employment Opportunity Act of 1972 (the "Act") contain any substantive discussion of the issue of sexual harassment; rather, the issue was primarily one of placing more women in more jobs at higher wages. *See, in general,* discussions concerning H.R. 1746, 92nd Cong., 1st Sess. [passed 117 Cong. Rec. H8458 (Sept. 15, 1971)] and S.2515, 92nd Cong., 2nd Sess. [passed 118 Cong. Rec. S2302 (Feb. 22, 1971)]. Nor do the EEOC Guidelines make any reference to a constitutional basis. If anything, these guidelines emphasize that such practice, *i.e.*, "[h]arassment on the basis of sex" constitutes a "violation of Sec. 703 of Title VII." 29 C.F.R. Sec. 1604.11(a).

Furthermore, the theory of "*quid pro quo*" sexual harassment did not develop in case law until the mid- to late-1970's. One of the first cases to hold that retaliatory acts by a male supervisor against a female employee who refused his sexual advances constituted sex discrimination under Title VII was *Williams v. Saxbe,* 413 F. Supp. 654 (D.D.C. 1976), *vacated on other grounds, Williams v. Bell,* 587 F.2d 1240 (D.C. Cir. 1978). In that case, the court relied solely upon Title VII and the Act in reaching its decision. *See also, Rabidue v. Osceola Refining Co.,* 805 F.2d 611 (6th Cir. 1986), *cert. denied,* 481 U.S. 1041 (1987) (plaintiff's claim of sexual harassment derives from Title VII's proscription against discrimination in employment on basis of sex).

Courts in the 1980's have held that sexual harassment (as a distinct form of sexual discrimination) is a type of discrimination actionable under Title VII.

They have further found that sexual harassment can take the form of either "hostile work environment" or "*quid pro quo.*" *See, e.g., Henson v. City of Dundee,* 682 F.2d 897 (11th Cir. 1982). Although Petitioner recognizes the propriety of expanding sexual discrimination to include claims of sexual harassment, of concern is the fact that courts have merely assumed the applicability of Section 1983 to claims of "*quid pro quo*" sexual harassment applying a Title VII analysis and tacking on the additional requirement of discriminatory intent. *See, e.g., Keppler v. Hinsdale Township High School District 86,* 715 F. Supp. 862 (N.D. Ill. 1989); *Lipsett v. University of Puerto Rico,* 864 F.2d 881, 898 (1st Cir. 1988).

Although it is not inappropriate to use a Title VII analysis to examine a constitutional claim, *Merwine v. Board of Trustees for State Institutions of Higher Learning,* 754 F.2d 631, 635 n.3 (5th Cir.), *cert. denied,* 474 U.S. 823 (1985), transplanting a claim from one type of action to another without regard to the accompanying requirements inherent to the type of action involved is prohibited. *Alexander, supra; accord, Greenwood v. Ross,* 778 F.2d 448 (8th Cir. 1985) (when Title VII claims have been disallowed, a Section 1983 retaliatory discharge claim cannot be based upon Title VII). As was stated by the District Court for the Eastern District of Wisconsin in *Torres v. Wisconsin Department of Health & Social Services,* 592 F. Supp. 922, 928 (E.D. Wis. 1984), *affirmed,* 838 F.2d 944 (7th Cir. 1988), *cert. denied,* 109 S. Ct. 1537 (1989), a Section 1983 claim "should not proceed solely on the coattails of rights prescribed by Title VII."

A recognition that the Equal Protection Clause may be the basis for an action alleging sexual discrimination in employment does not equate with recognition of that same clause as the basis of an action alleging "*quid pro quo*" sexual harassment of an individual. *See, e.g., Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65, 91 L. Ed. 2d 49 (1986) (Court defines "hostile environment as "*non quid pro quo*"). Sexual discrimination cases must have as a basic element different treatment on the basis of gender. This basic causation element is also found in cases dealing with "hostile work environment" where an environment is created which is hostile to all members of a given sex, not a particular individual. *Poe v. Haydon*, 853 F.2d 418, 428-29 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 788 (1989).[4] The same cannot so readily be said in regard to "*quid pro quo*" sexual harassment claims.

The fact that an action may violate Title VII does not mean that it also violates the Equal Protection Clause of the Fourteenth Amendment. Rather, in order to state a claim under the Equal Protection Clause, a party must establish intentional discrimination against the individual because of the person's membership in a particular class, not merely because that person was treated unfairly as an individual. *Huebschen v. Department of Health & Social Services*, 716 F.2d 1167, 1171 (7th Cir. 1983). The Equal Protection Clause contains a "federal constitutional right to be free from **gender** discrimination. . . ." *Davis v. Passman*, 442 U.S. 228, 234, 60 L. Ed. 2d 846 (1979) (emphasis added).

[4] In speaking of the "hostile work environment, the Seventh Circuit has stated, "Forcing women and not men to work in an environment of sexual harassment is no different than forcing women to work in a dirtier or more hazardous environment than men simply because they are women. Such unjustified unequal treatment is exactly the type of behavior prohibited by the equal protection clause. . . ." *Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180, 1185 (7th Cir. 1986).

Applying this standard to the facts in *Huebschen*, the Seventh Circuit rejected a claim of "*quid pro quo*" sexual harassment under 42 U.S.C. 1983:

> The appellee [a male] argues that the relevant group or classification is men and that Rader [appellee's female supervisor] would not have discriminated against him if he were not a man. We are not convinced, however, that Rader discriminated against Huebschen as a man rather than merely as an individual .... When the consensual romance between Huebschen and Rader ended in November 1979, Rader did indeed react spitefully towards Huebschen by recommending that he be demoted at the end of the probationary period. But Rader's motivation in doing so was not that Huebschen was male, but that he was a former lover who had jilted her.
>
> * * *
>
> Thus, the proper classification, if there was one at all, was the group of persons with whom Rader had or sought to have a romantic affair. It was this group, of which Huebschen may have been the only one, that Rader sought to disadvantage. As unfair as Rader's treatment of Huebschen may have been, we simply are not persuaded that the Equal Protection Clause should protect such a class.

Huebschen, 716 F.2d at 1171-72.

In the context of the present case, the touchstone for purposes of the Equal Protection Clause is the requirement of gender-based, not individual, discrimination. *See, Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 276-78, 60 L. Ed. 2d 870 (1979). However, claims of "*quid pro quo*" sexual harassment are by their very nature highly individual and do not readily fall into a suspect gender

classification.[5] A female supervisor may make sexual demands on one male employee but not another, as was the case in *Huebschen, supra.* Another supervisor may make demands upon an employee of the same sex. Although such conduct may be improper, the legal impropriety is due to Title VII's prohibition against "*quid pro quo*" sexual harassment, not because the individual in question has been denied equal protection under the Fourteenth Amendment to the United States Constitution. Indeed, in *Henson*, 682 F.2d at 904, a case arising solely under Title VII, the Eleventh Circuit questioned whether this would state a claim at all:

> [T]here may be cases in which a supervisor makes sexual overtures to workers of both sexes or where the conduct complained of is equally offensive to male and female workers. . . . In such cases, the sexual harassment would not be based upon sex because men and women are accorded like treatment. Although the plaintiff might have a remedy under state law in such a situation, the plaintiff would have no remedy under Title VII.

A holding that a claim of "*quid pro quo*" sexual harassment is prohibited by Title VII but does not state a claim under the Equal Protection Clause of the Fourteenth Amendment is consistent with the law to be applied in determining the applicability of the Equal Protection Clause as well as with the intent of Congress to bar such claims against elected officials.

In enacting the 1972 amendments to Title VII, Congress specifically excluded certain public employees from coverage. Specificaly, 42 U.S.C. Sec. 2000e(f) defines an employee as:

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[5] The reasons why a person may impose "*quid pro quo*" sexual demands upon another can be numerous—personality, height, weight, race, and sexual preference, if any, to name but a few.

> any individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State . . . *or any person chosen by such officer to be on such officer's personal staff,* . . . (emphasis added).

It was this definitional section upon which the trial court in this case relied in finding that Respondent was not entitled to pursue a claim under Title VII:

> The Court finds as a matter of law that plaintiff was a member of Representative Thompson's personal staff. . . . In viewing the nature of the employment relationship between plaintiff and defendant Thompson, the Court can come to no other conclusion but that a legislative aide is the archetypal member of an elected official's personal staff contemplated in the exemption.

Opinion & Order of District Court, June 8, 1988 at p. A10.

The purpose of the exemption can be seen in the following statement found in the debates of the 1972 amendments to Title VII:

> Mr. Williams. . . . I certainly subscribe, and for many reasons, to the exclusion of the elected official at the State and local governing level. His test comes at the polls rather than under a law of this nature. I think that is certainly sufficient test as to propriety in the undertaking of his office, in view of the people that have the opportunity to select him for elected office. For another reason, I would think he should not be in a position to have unwarranted and irresponsible charges made against him. Again, his test would be at the polls.
>
> The second degree relates to other people who are covered. That is basically the purpose of the amendment, to exempt from coverage those who are chosen by the Governor or the mayor or the county supervisor, whatever the elected official is, and who

> are in a close personal relationship and an immediate relationship with him. Those who are his first line of advisers.

118 Cong. Rec. 4492-93 (Feb. 17, 1972).

The necessity of exempting aides of elected officials from Title VII coverage has also been recognized by the Equal Employment Opportunity Commission ("EEOC"):

> Congress expressed its awareness of the sensitive considerations involved in the selection of an elected official's personal staff. Inherent in the selection of personal staff is the criteria of absolute trust, which emanates from a personal relationship between the elected official and his personal staff. Elected officials are left free to choose those individuals, who work in immediate contact with them, and who will best aid them in the carrying out of their official duties.

EEOC Decision No. 78-33 (Jun. 1, 1978).

Representative Thompson recognizes and does not dispute an individual's right to pursue a claim through 42 U.S.C. Sec. 1983, provided such claim concerns a federal right recognized prior to the 1972 amendments to Title VII and provided that the federal right (for purposes of this case) is constitutional rather than statutory in nature. The present case, however, involves a claim which was not recognized prior to the 1972 amendments to Title VII and further involves a claim which does not fall within the purview of the Equal Protection Clause of the Fourteenth Amendment.

Petitioner recognizes that at least one other Circuit has recently held that an individual can state a claim for sexual harassment under the Equal Protection Clause. *Starrett v. Wadley,* 876 F.2d 808 (10th Cir. 1989). In *Starrett,* however, the Tenth Circuit failed to make any

distinction between "hostile environment" as compared to "*quid pro quo*" claims. Furthermore, the court makes no mention of the Seventh Circuit decision of *Huebschen*, and fails to engage in any equal protection analysis other than to rely upon cases which involved "hostile environment" claims.

In contrast to *Starrett*, this case is highly analogous to that which was before the Seventh Circuit in *Huebschen, supra*. In *Huebschen*, plaintiff was barred from proceeding under Title VII because he sought to bring suit against his supervisor, not his employer. He was further barred from proceeding under 42 U.S.C. Sec. 1983 because his "*quid pro quo*" sexual harassment claim did not set forth a claim under the Equal Protection Clause of the Fourteenth Amendment. In the present case, Respondent was barred from proceeding under Title VII because she sought to bring suit against an elected official.[6] She should also be barred from proceeding under 42 U.S.C. Sec. 1983 because a "*quid pro quo*" sexual harassment claim does not state a claim under the Equal Protection Clause of the Fourteenth Amendment.

Failing to limit a claim of "*quid pro quo*" sexual harassment to Title VII, despite the fact that it has evolved subsequent to the 1972 amendments to Title VII, permits an individual to circumvent the very restriction Congress attempted to impose.[7] As the Seventh Circuit stated in *Huebschen*, 716 F.2d at 1170, "The effect of allowing a plaintiff to bring an action under Sec. 1983 based upon Title VII against a

[6] Respondent was also employed by the Ohio House of Representatives, not Representative Thompson, and was reassigned by the House to a different position.

[7] As was stated by the Tenth Circuit in *Owens v. Rush*, 654 F.2d 1370, 1375 (10th Cir. 1981), Congress intended the personal staff exception to apply "to those individuals who are in highly intimate and sensitive positions of responsibility on the staff of the elected official."

defendant who could not be sued directly under Title VII would be to enlarge the relief available to one bringing an action for a violation of Title VII." *See also, Talley v. City of De Soto,* 37 F.E.P. 375 (N.D. Tex. 1985).

In the present case, the Trial Court impermissibly enlarged the relief available to Respondent by giving an erroneous instruction. The jury instruction was as follows:

> The second element of the plaintiff's claim is that Ike Thompson deprived her of a federal right by subjecting her to *quid pro quo* sexual harrassment, thereby depriving her of the equal protection of the law. In order for the plaintiff to establish this second element, she must show five things by a preponderance of the evidence:
>
> First, that the plaintiff was member of a class of persons protected by Section 1983 of Title 42;
>
> Second, the defendant subjected the plaintiff to sexual harassment in the form of unwelcome sexual advances or requests for sexual favors;
>
> Third, the harassment complained of was based on sex;
>
> Fourth, the plaintiff's submission to the unwelcome advances was a condition for receiving job benefits or the plaintiff's refusal to submit to the defendant's sexual advances resulted in adverse employment actions;
>
> Fifth, the defendant acted intentionally.

There is no controlling case law in the Sixth Circuit which illuminates this question. However, based upon the analysis discussed above, the instruction was erroneous and prejudicial to Petitioner as is demonstrated by the fact that the jury found for Petitioner on all other claims. This Court is therefore urged to take this opportunity to clarify this point and reverse the judgment of the courts below.

Second Question Presented:

II. By Embracing The Applicable Exception To Fed. R. Civ. P. 51, This Court Has The Opportunity To Decide This Constitutionally Important Issue And Prevent The Miscarriage Of Justice Which Would Result From Dismissal Of This Appeal On Purely Procedural Grounds.

Fed.R.C.P. 51 is designed to promote orderly and just functioning of the judicial system. However, the exception to this rule (that when the ends of justice require, the Court will entertain appeals from instructions when no objection was made) exists to protect the fundamental fairness of the trial process and avoid miscarriages of justice. *Dowell, Inc. v. Jowers,* 166 F.2d 214, *cert. denied,* 334 U.S. 832 (5th Cir. 1948). The Rule 51 exception has been applied by this Court where an objection to the jury instruction was not made but the same legal issue which should have been taken up at the time the instructions were rendered was presented at some other point in the trial by way of motion for summary judgment or motion for directed verdict. *St. Louis v. Praprotnik,* 485 U.S. 112, 99 L. Ed. 2d 107 (1988).

The issue of whether a claim of "*quid pro quo*" sexual harassment under Title VII was available to Respondent or whether she was required to proceed under 42 U.S.C. Section 1983 relying upon the Equal Protection Clause of the Fourteenth Amendment was the subject of Petitioner's motion for summary judgment argued in great detail before the Trial Court. *See* Opinion attached hereto at Appendix A5. The Trial Court dealt at length with this question and determined, in granting summary judgment to Petitioner as to the Title VII

claims, that Section 1983 proscribes class-based discrimination. Despite the key role that this question played throughout this litigation, the Trial Court's instruction did not correctly reflect Fourteenth Amendment standards. Instead, the equivalent of a Title VII instruction was submitted to the jury.

Both parties and the Court were confronted with a claim of unclear contour. "The parameters of a cause of action alleging sexual harassment as a violation of the equal protection clause have not been precisely defined." *Trautvetter v. Quick*, 916 F. 2d 1140, 1148 (7th Cir. 1990). Consequently, this very issue may confront other litigants. As there is no opinion of the Sixth Circuit or Supreme Court on this point, future litigants will be left with very little direction. In such an instance the principles of *Praprotnik* necessitate that this Court make an exception to R. 51 and take up the task of clarifying this issue so the lower courts and litigants may have a "fairer chance to craft jury instructions that will not necessitate scrutiny on appellate review." *Praprotnik* at 121.

Where the legal issue involved is novel, important, recurring and likely to have "broad legal ramifications," as is the issue presently before this Court, fair administration of justice would not be served by the Court's refusal to hear this appeal. *Getty Petroleum Corp. v. Bartco*, 858 F. 2d 103, 108 (2nd Cir. 1988).

CONCLUSION

This Court should grant the Petition for A Writ of Certiorari to make clear that a "*quid pro quo*" sexual harassment claim alleged under Title VII and proof required thereby is distinct from a sexual harassment claim brought pursuant to 42 U.S.C. Section 1983 as violative of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. There is no Sixth Circuit or United States Supreme Court precedent to guide the trial courts or future litigants of this issue. Accordingly, it is manifestly unjust not to offer the judicial guidance needed especially in light of the extraordinary importance of this issue and the personal and civil rights which hang in the balance.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed June 7, 1991)

[NOT RECOMMENDED FOR FULL-TEXT PUBLICATION]

No. 90-3290

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JANINE THOMPSON,
Plaintiff-Appellee,

v.

ISIAH THOMPSON,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Before: *RYAN, and SUHRHEINRICH, Circuit Judges; and SILER, Chief District Judge.**

PER CURIAM. The Appellee, Janine Thompson [hereinafter "the plaintiff"], filed an action in 1984 in the district court against the Ohio House of Representatives.

* The Honorable Eugene E. Siler, Jr., Chief United States District Judge for the Eastern District of Kentucky and United States District Judge for the Western District of Kentucky, sitting by designation.

Representative Isiah Thompson [hereinafter "the defendant"], and Thomas R. Winters[1] alleging that the defendants discriminated against her and harassed her because of her sex. She alleged that the defendant's conduct violated the fourteenth amendment to the United States Constitution, 42 U.S.C. §1983, and 42 U.S.C. §2000e et seq.[2] She also brought pendent state claims for assault and battery, intentional infliction of emotional distress, and invasion of privacy.

The jury found that the defendant had violated 42 U.S.C. §1983 by subjecting the plaintiff to "quid pro quo" sexual harassment, but it found for the defendant on all other claims. A judgment in the amount of $55,000.00 for compensatory damages and $50,000.00 for punitive damages was entered. The defendant filed a timely motion for judgment notwithstanding the verdict or, alternatively, for a new trial. The trial court denied the motion on March 13, 1990, and this appeal followed.

The defendant contends on appeal that the trial court erred as a matter of law in permitting the plaintiff to proceed with a claim of "quid pro quo" sexual harassment under 42 U.S.C. §1983 as violative of the fourteenth amendment equal protection clause. It is unnecessary to resolve the merits of this contention because the defendant failed to preserve this issue for appeal.[3]

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[1] Thomas R. Winters, former Executive Secretary of the Ohio House of Representatives, and the Ohio House of Representatives were dismissed from the suit.

[2] The trial court dismissed the Appellee's Title VII claims on the ground that 42 U.S.C. §2000e(f) exempted her from Title VII coverage.

[3] The decision in this action does not in any way reflect upon whether a claim of "quid pro quo" sexual harassment is actionable pursuant to 42 U.S.C. §1983 where the defendant's conduct violates the equal protection clause.

The defendant's failure to object to the district courts jury instructions[4] precludes him from prevailing on appeal.[5] Rule 51 is to be construed strictly. See *Springfield v. Kibbe*, 480 U.S. 157, 159 (1987); *Young v. Langley*, 383 F.2d 792 (6th Cir.), *cert. denied*, 439 U.S. 850 (1986). In *Young*, this court held that a party waives his right to appeal if he does not object to the instructions tendered at trial. *Id.* at 795. The *Young* court enunciated an exception to the aforementioned general rule in stating that the interests of justice warrant appellate review if an error in the jury instructions is obvious and prejudicial, notwithstanding the absence of an earlier objection. *Id.*

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[4] The court instructed the jury that:

> The second element of the plaintiff's claim is that Ike Thompson deprived her of a federal right by subjecting her to quid pro quo sexual harassment, thereby depriving her of the equal protection of the law. In order for the plaintiff to establish this second element, she must show five things by a preponderance of the evidence:
>
> First, that the plaintiff was member of a class of persons protected by §1983 of Title 42;
>
> Second, the defendant subjected the plaintiff to sexual harassment in the form of unwelcome sexual advances or requests for sexual favors;
>
> Third, the harassment complained of was based on sex;
>
> Fourth, the plaintiff's submission to the unwelcome advances was a condition for receiving job benefits or the plaintiff's refusal to submit to the defendant's sexual advances resulted in adverse employment actions;
>
> Fifth, the defendant acted intentionally.

[5] Rule 51 of the Federal Rules of Civil Procedure [hereinafter "Rule 51"] states as follows:

> No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

After carefully reviewing the record before us, we conclude that the alleged error was not brought to the court's attention. The defendant complains on appeal that the plaintiff is relying, in part, on proof that was not admitted into evidence at trial, and therefore was not subjected to cross examination. The defendant further contends that the omitted evidence is outside the record, irrelevant, and prejudicial. Although not in the record, the evidence may have been relevant to the issue which is raised on appeal and may have been relevant to issues of consequence at trial had the defendant chosen to raise the issue now addressed on appeal in a timely fashion.

The defendant has cited *Ivey v. Wilson*, 832 F.2d 950, 955 (6th Cir. 1987), as authority for the court to grant relief where the error was obvious and prejudicial, even if the party did not object to the instructions given. However, if there was error here, it may have been prejudicial, but it was not obvious. Under *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989), and *Volk v. Coler*, 845 F.2d 1422 (7th Cir. 1988), such a cause of action exists and the evidence in this case in the light most favorable to the plaintiff justifies such a theory to be presented to the jury. The failure to object to the jury's consideration of whether a §1983 "quid pro quo" sexual harassment claim is cognizable in this action is fatal to this appeal. Therefore, the decision by Judge Kinneary is AFFIRMED.

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed June 8, 1988)

Case No. C-2-84-1865

UNITED STATES DISTRICT COURT
SOUTHERN OHIO DISTRICT
EASTERN DIVISION

JANINE THOMPSON,
Plaintiff,

v.

IKE THOMPSON, *et al.,*
Defendants.

OPINION AND ORDER

This matter comes before the Court to consider defendants Ohio House of Representatives and Thomas R. Winters' motion for summary judgment.

Plaintiff Janine Thompson brought this action against the Ohio House of Representatives, State Representatives Ike Thompson, and Thomas R. Winters, the former Executive Secretary of the Ohio House of Representatives. Plaintiff alleges that Representative Thompson continually subjected her to sexual harassment during the time of her employment as his legislative aide. Plaintiff also alleges that Winters knew of and failed to eliminate the environment of sexual harassment, failed to promptly transfer her to a different position, and, after her eventual transfer, assigned her to

a position with less duties and responsibilities. Furthermore, plaintiff alleges that she was denied promotional opportunities on the basis of her sex. Plaintiff alleges that these acts violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*, and constituted a denial of her right to equal protection guaranteed her by the fourteenth amendment and 42 U.S.C. §1983. In addition, plaintiff brings state claims of assault and battery, intentional infliction of emotional distress, and invasion of privacy.

Defendants Ohio House of Representatives and Thomas R. Winters contend that they are entitled to summary judgment on plaintiff's claims for the following reasons:

1) that plaintiff is not covered under Title VII, because she was not an "employee" as defined by 42 U.S.C. 2000e(f);

2) that the eleventh amendment bars the Section 1983 and state tort claims against defendants Ohio House of Representatives and Winters;

3) that plaintiff fails to state a claim under Section 1983;

4) that defendant Winters is entitled to qualified immunity on the Section 1983 claim;

5) that defendants Ohio House of Representatives and Winters are entitled to absolute legislative immunity on the Section 1983 and state tort claims; and

6) that plaintiff failed to properly serve defendant Ohio House of Representatives within 120 days of filing the Complaint.

The Court will address each contention in defendants' motion for summary judgment in turn.

Rule 56(c) of the Federal Rules of Civil Procedure provides, in pertinent part, as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The moving party bears the burden of establishing the absence of a genuine issue as to any material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). While "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [its] favor," the evidence must be viewed "through the prism of the substantive evidentiary burden" upon the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-55 (1986). Thus, the Court's inquiry in this matter must address "whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Id.* at 252.

I. *The Scope of Title VII*

Defendants contend that plaintiff, as a member of Representative Thompson's personal staff, is exempted from the coverage of Title VII, because Congress, in defining the term "employee," expressly excluded the personal staffs of elected officials. Plaintiff responds by claiming that the "personal staff exception" does not apply in cases of sexual harassment, because the coverage of Title VII in such cases is not limited to "employees." Furthermore, plaintiff contends that, even if the personal staff exception does apply in such cases, it does not apply in this case, because plaintiff did not serve on Representative Thompson's "personal staff," as the courts have defined the term.

The definition section of Title VII, 42 U.S.C. 2000e, defines the term "employee" to include:

> any individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State . . . or any person chosen by such officer to be on such officer's personal staff, . . .

42 U.S.C. 2000e(f). Some of the substantive provisions of the Act specifically use the term "employee" when defining the protected person under the Act. For example, the retaliation provision, 42 U.S.C. 2000e-3, prohibits retaliatory conduct against "employees" who have opposed an unlawful employment practice. In contrast, the chief substantive provision of Title VII, the provision which has been interpreted to cover sexual harassment, does not refer to "employees," but instead states that:

> [i]t shall be an unlawful employment practice for an employer . . . to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

42 U.S.C. 2000e-2(a) (emphasis added).

Nonetheless, despite the difference in the statutory language, the Court believes that both the legislative history and the subsequent case law applying the personal staff exemption support the contention that Congress meant to completely exclude the personal staffs of elected officials from the coverage of Title VII. The protections of Title VII did not encompass state employees until 1972 when Congress amended the Act to include them within its coverage. The 1972 amendments to Title VII extended the Act's coverage to state employees, but also introduced the exemption for elected

officials and their personal staffs. It is apparent that the exemption for elected officials and their personal staffs was meant to be a general limitation on the extention of the coverage to state employees and not merely a limitation as to certain portions of the Act.

The original Senate amendment expanded coverage of Title VII to include "[s]tate and local governments, government agencies, political subdivisions (*except for elected officials, their personal assistants and immediate advisors*) and the District of Columbia departments and agencies. . . .) Joint Explanatory Statement of Managers at the Conference on H.R. 1746, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 2179, 2180 (emphasis added). The Conference Committee, in preparing the final version of the bill, elected not to use this language, but chose instead to amend the definition section of the Act so that the term "person" would include governments, governmental agencies, and political subdivisions, and that the term "employee" would not include elected officials and their personal staffs. Nevertheless, it is apparent that the Committee did not intend to change the substance of the Senate bill. The coverage of Title VII was to be extended to include all state employees except elected officials, their personal staffs, and their immediate advisors. The Conference Committee report simply states that "[i]t is the intention of the conferees to exempt elected officials and members of their personal staffs." Joint Explanatory Statement of Managers at the Conference on H.R. 1746, *reprinted in* 1972 U.S. Code Cong. & Admin. News 2179, 2180. There is no indication whatsoever that the Committee intended the exemption to be anything less than a complete exclusion from coverage under the Act.

The courts that have applied the personal staff exemption have not differentiated between the protections of the Act that cover "individuals" as opposed to "employees," but have interpreted the exemption to be a complete exclusion from the Act. *See e.g., Teneyuca v. Bexar County,* 767 F.2d 148, 150 (5th Cir. 1985) (Title VII failure to hire claim dismissed because assistant district attorney position covered by personal staff exemption); *Owens v. Rush,* 654 F.2d 1370, 1374 (10th Cir. 1981) (Title VII unlawful discharge claim dismissed because deputy sheriff position covered by personal staff exemption); *Ramirez v. San Mateo County,* 639 F.2d 509, 511 (9th Cir. 1981) (Title VII failure to hire claim dismissed because deputy district attorney position covered by personal staff exemption). This Court will also treat the personal staff exemption as a complete exclusion from the coverage of the Act. Therefore, plaintiff must show that she was not a member of Representative Thompson's personal staff before she can claim relief under Title VII.

The Court finds as a matter of law that plaintiff was a member of Representative Thompson's personal staff. In making such a determination, the Court must look at the "nature and circumstances of the employment relationship between the complaining individual and the elected official to determine if the exception applies." *Owens,* 654 F.2d at 1375. In viewing the nature of the employment relationship between plaintiff and defendant Thompson, the Court can come to no other conclusion but that a legislative aide is the archetypal member of an elected official's personal staff contemplated in the exemption.

The Court believes that the position of legislative aide falls so clearly within the exemption, that it need not rely on an analysis of the factors which other courts have found helpful in reviewing the nature and circumstances of the employment relationship. Nonetheless, even if this factor analysis were utilized, the Court believes that no reasonable jury could find that plaintiff was not a member of Representative Thompson's personal staff. These factors include:

> (1) whether the elected official has plenary powers of appointment and removal, (2) whether the person in the position at issue is personally accountable to only that elected official, (3) whether the person in the position at issue represents the elected official in the eyes of the public, (4) whether the elected official exercises a considerable amount of control over the position, (5) the level of the position within the organization's chain of command, and (6) the actual intimacy of the working relationship between the elected official and the person filling the position.

Teneyuca, 767 F.2d at 151.

Plaintiff's own testimony strongly indicates that she had a close working relationship with defendant Thompson. Plaintiff testified that she worked directly for Representative Thompson and that he had control over what duties she was assigned. This testimony is supported by the type of work plaintiff did while serving as Representative Thompson's aide. She wrote press releases and news columns for Representative Thompson. She wrote the speeches he gave on the house floor. She answerd his constituent mail, prepared background material for him, reviewed and drafted legislation, attended fund raisers, and managed his office. She clearly represented Representative Thompson at public functions. She attended hearings and meetings in his

absence and met with lobbyists on his behalf. The fact that Representative Thompson's staff was very small, consisting of plaintiff, a secretary, and a page, also strongly indicates that there was a close working relationship between plaintiff and defendant Thompson.

The only factor over which there is a genuine issue of fact is the question of who had the official power to appoint and remove plaintiff from her position. However, the Court does not believe that this factual dispute is material. The fact that Representative Thompson may not technically have had the power to hire, fire, or transfer plaintiff does not sufficiently overcome the other factors to raise a genuine issue of material fact as to whether plaintiff was a member of Thompson's personal staff.

Given that the Court has found as a matter of law that plaintiff was a member of Representative Thompson's personal staff and that, as a member of an elected official's personal staff, plaintiff is not covered by Title VII, the Court believes that summary judgment for defendants Winters and the Ohio House of Representatives is appropriate on plaintiff's Title VII claim.

II. *Eleventh Amendment Immunity*

Defendants Ohio House of Representatives and Winters contend that plaintiff's Section 1983 and state tort claims against them are barred by the eleventh amendment to the United States Constitution. The eleventh amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although not apparent from the language of the amendment, the eleventh amendment has been interpreted by the courts to bar any suits in federal court against a state or state agency for either damages or injunctive relief. *See Kentucky v. Graham*, 473 U.S. 159, 167 n.14. Plaintiff acknowledges that defendant Ohio House of Representatives is clearly immune from suit under the eleventh amendment on the Section 1983 and state tort claims. Accordingly, the Court finds that summary judgment for defendant Ohio House of Representatives on these claims is appropriate.

The eleventh amendment has also been interpreted to bar suits in federal court for monetary damages against state officials sued in their official capacity. *Id.* at 169. However, the eleventh amendment is no bar to suits for prospective relief against state officials in their official capacity or to suits for monetary damages against state officials in their personal capacity. *Id.* at 165-68. Therefore, in evaluating defendants contention that the eleventh amendment bars plaintiff's claims against defendant Winters, the Court must determine whether defendant Winters is being sued in his personal or official capacity. If Winters is being sued in his personal capacity, the eleventh amendment does not apply at all. If Winters is being sued in his official capacity as Executive Secretary of the Ohio House of Representatives, the eleventh amendment applies, but does not prevent the Court from ordering the current Executive Secretary to rehire the plaintiff.[1]

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[1] Technically, a suit against the Executive Secretary of the Ohio House of Representatives would no longer be a suit against defendant Winters, as he no longer holds that position. However, Federal Rule of Civil Procedure 25(d) provides that when a public officer who is a party to an official-capacity action leaves office, the officer's successor is automatically substituted as a party.

A. *Personal Capacity*

It is clear to this Court that the Supreme Court's comment in *Kentucky v. Graham* that the distinction between personal- and official-capacity suits under Section 1983 "continues to confuse lawyers" remains accurate. *Id.* at 165. This confusion is evident in defendant's position on this issue. Defendant Winters contends that a suit against a public official challenging actions that were performed as part of the official's official duties cannot be brought against the official in his personal capacity, but may only be brought against him in his official capacity. This argument reflects a fundamental misunderstanding of the nature of the distinction between personal- and official-capacity suits. To establish personal liability in a Section 1983 action, it is only necessary to show that the official, while acting under color of state law, caused the deprivation of a federal right. *Id.* at 166. The fact that the official's actions were performed as part of his official duties is irrelevant. There is no requirement, as defendant Winters contends, that the plaintiff show that the official "was acting outside the scope of his official duties or was abusing the lawful powers of his office." Accordingly, the Court finds that defendant Winters is being sued in his personal capacity, and that, therefore, the eleventh amendment does not bar such an action.

B. *Official Capacity*

The Court believes that it cannot determine at this time whether an official-capacity action against the current Executive Secretary of the Ohio House of Representatives is appropriate. To establish official liability in a Section 1983 action, it is necessary that plaintiff prove all the elements of a personal-capacity

action and, *in addition*, establish that the governmental entity's policy or custom" played a part in the deprivation of the federal right. The United States Supreme Court has held that a single action of a public official represents the "policy" of a governmental entity if the official has "final policymaking authority" with respect to that action. *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986). The question of whether an official has final policymaking authority is a question of state law and is to be determined by the court. *St. Louis v. Praprotnik*, 56 U.S.L.W. 4201, 4204-05 (March 2, 1988). In this case, the court must determine whether the Executive Secretary of the Ohio House of Representatives has final policymaking authority with respect to the supervision of legislative aides. Given that neither party has provided the Court with any authority on this issue, the Court will not decide at this time whether the current Executive Secretary can be sued in his official capacity.

III. *The Scope of Section 1983*

Defendant Winters contends that plaintiff's allegations of sexual harassment fail to state a claim under Section 1983, because it fails to state a constitutional violation. Winters contends that although sexual harassment is a violation of Title VII, it is not a violation of the Equal Protection Clause of the fourteenth amendment. The Court, however, finds that sexual harassment is a violation of the Equal Protection Clause of the fourteenth amendment and that, therefore, plaintiff has stated a claim under Section 1983.

In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the United States Supreme Court held that "[w]ithout question, when a supervisor sexually harasses

a subordinate because of the subordinate's sex, that supervisor discriminate[s] on the basis of sex." *Id.* at 64. The Supreme Court has also held that the Equal Protection Clause provides a federal constitutional right to be free from gender discrimination that does not "serve important governmental objectives" and is not "substantially related to those objectives." *Davis v. Passman*, 442 U.S. 228, 234-34 (1979). Although *Meritor Savings Bank* involved an action brought under Title VII, this Court can see no reason why sexual harassment would constitute sexual discrimination under Title VII and not the Equal Protection Clause.

Nearly every Court that has examined this issue has found that sexual harassment is a constitutional violation, including the Court of Appeals for the Seventh Circuit and a District Court in this circuit. *See, e.g., Bohen v. City of East Chicago*, 799 F.2d 1180 (7th Cir. 1986); *Royal v. City of Albuquerque*, 653 F. Supp. 102 (N.D.N. Mex. 1986). *Estate of Scott v. deLeon*, 603 F. Supp. 1328 (E.D. Mich. 1985). This Court also believes that creating and maintaining an abusive environment for an employee purely on the basis of the employee's sex is clearly the type of intentional disparate treatment that the Equal Protection Clause is meant to prevent.

The Court is not persuaded by defendant's arguments that sexual harassment should not be considered to be a constitutional violation. Defendant first claims that if sexual harassment is found to be a constitutional violation, "every passing overture made by a public official and every action or inaction of a supervisory level employee would be raised to a fundamental constitutional right." In making this argument, defendant clearly ignores the Supreme Court's discussion in *Meritor Savings Bank* of the level of sexual

harassment necessary to constitute sexual discrimination. 477 U.S. at 65-67. The Court held that sexual misconduct constitutes sexual discrimination under Title VII only when "it is directly linked to the grant of an economic *quid pro quo*" or where the harassment is so severe as "to alter the conditions of the victim's employment and create an abusive environment." *Id.* at 67. This court does not believe that recognizing sexual harassment as defined under Title VII as a constitutional violation will serve to "trivialize the rights guaranteed by the Fourteenth Amendment," as claimed by the defendant.

Defendant also contends that sexual harassment should not be found to be a constitutional violation, because it would enable victims of sexual harassment to bring suits against public employers under Section 1983 and avoid the administrative procedures mandated by Congress in Title VII. This argument has been directly rejected by the Court of Appeals for the Sixth Circuit, which held that:

> [w]here an employee establishes employer conduct which violates both Title VII and rights derived from another source—the Constitution or a federal statute—which existed at the time of the enactment of Title VII, the claim based on the other source is independent of the Title VII claim, and the plaintiff may seek the remedies provided by Section 1983 in addition to those created by Title VII.

Day v. Wayne County Board of Auditors, 749 F.2d 1199, 1205 (1984). Defendant is unable to provide the Court with any reason why Title VII should be the exclusive remedy for claims of sexual harassment when it is not so for other types of unconstitutional intentional sexual and racial discrimination.

IV. *Qualified Immunity under Section 1983*

Defendant Winters contends that he is entitled to qualified immunity from plaintiff's Section 1983 claim. The Court initially notes that the qualified immunity defense is a personal defense and can only be asserted in a personal capacity action. *Kentucky v. Graham,* 473 U.S. at 166-67. Thus, if this action is also able to be appropriately maintained against the current Executive Secretary of the Ohio House of Representatives in his official capacity, he cannot assert the good faith immunity defense.

An official is entitled to qualified or good faith immunity if his challenged actions did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). To be immune from suit under Section 1983, the official need not establish that he had no reason to know that his conduct was unlawful, but only that he had no reason to know that his conduct was unconstitutional. *Davis v. Scherer,* 468 U.S. 183, 193-94 (1984). The question of whether a constitutional right is clearly established is a question of law for the court to decide. *Harlow v. Fitzgerald,* 457 U.S. at 818. Therefore, in order to decide whether defendant is protected by qualified immunity in this case, the Court must determine whether sexual harassment violated clearly established constitutional rights of which the defendant should reasonably have known.

Defendants concede that at the time plaintiff's claims arose it was clearly established that sexual harassment constituted sexual discrimination under Title VII, but contend that it was not clearly established that

sexual harassment constituted sexual discrimination under the Equal Protection Clause, because only one circuit and one district court had addressed the issue at that time. This Court is not persuaded by defendant's argument. At the time these actions allegedly occurred, it was clearly established that the Equal Protection Clause prohibited intentional sexual discrimination unless it was substantially related to a legitimate governmental objective. *Craig v. Boren*, 429 U.S. 190, 197 (1976). The Court does not believe that the fact that few courts had directly held that this particular form of intentional sexual discrimination, sexual harassment, constituted a constitutional violation prevents this Court from finding that the constitutional right to be free from sexual harassment was clearly established. It does not take a specific court finding for the reasonable person to know that each particular form of intentional sexual discrimination violates a clearly established constitutional right. The fact that it was clearly established that sexual harassment constituted intentional discrimination under Title VII, while not conclusive on the issue, is certainly a strong indication that such behaviour is also unconstitutional.

This Court wholly concurs with the opinion of Judge Feikens in *Estate of Scott v. deLeon*, 603 F. Supp. at 1332, where he found that he had:

> little difficulty concluding from these principles that it was clearly established that sexual harassment could violate the rights protected by the equal protection clause. Although no case had considered this issue, common sense as well as relevant Title VII case law indicated that harassment was the sort of invidious gender discrimination that the equal protection clause forbade: that is, intentional discrimination against a woman because of her sex by a person acting under color of law . . .

Accordingly, the Court finds that defendant is not entitled to qualified immunity on plaintiff's Section 1983 claim against him in his personal-capacity.

V. *Legislative Immunity*

Defendant Winters contends that plaintiff's Section 1983 and state tort claims against them are barred by the doctrine of legislative immunity. The Court notes initially that state legislators are not protected directly by the Speech and Debate Clause of the Constitution, as this clause applies only to members of Congress. However, state legislators are entitled to common-law legislative immunity from suit under Section 1983 for acts conducted within the traditional sphere of legislative activities. *See Tenney v. Brandhove*, 341 U.S. 367, 375 (1951). Ohio legislators are also protected from state suits for legislative acts by Article II, Section 12 of the Ohio Constitution. Legislative immunity is also available to aides of legislators for legislative acts. *See Gravel v. United States*, 408 U.S. 606 (1972). Therefore, if the actions of defendant Winters were conducted within the traditional sphere of legislative activities, then he is entitled to absolute immunity on all of plaintiff's claims.

The Court believes that the actions of defendant Winters being challenged in this case were performed in his administrative capacity and not in his legislative capacity. Supervision and management of House employees, including legislative aides, are adminstrative duties. While these acts are important to the actual performance of legislative acts, personnel decisions are not legislative acts in and of themselves.

The United States Supreme Court has recently addressed this issue as it applies to judicial immunity. *Forrester v. White*, 56 U.S.L.W. 4067 (January 12, 1988). In *Forrester*, the Court held that the employment decisions of a judge were administrative acts rather than

judicial acts and could, therefore, form the basis of a sexual discrimination suit under Section 1983. Given that defendant Winters' actions were administrative in nature, he is not absolutely immune from plaintiff's sexual discrimination claim under Section 1983 or her state tort claims.

VI. *Improper Service*

Given that the Court has granted summary judgment to defendant Ohio House of Representatives on all of plaintiff's claims, the Court need not address defendant Ohio House of Representative's contention that it was not properly served.

WHEREUPON, upon consideration and being duly advised, the Court finds the motion for summary judgment of defendants Ohio House of Representatives and Winters to be partially meritorious. With respect to all claims against defendant Ohio House of Representatives, the motion is GRANTED, and defendant Ohio House of Representatives is DISMISSED from this action. With respect to plaintiff's Title VII claims against defendant Winters, the motion is GRANTED. With respect to plaintiff's Section 1983 claim against the Executive Secretary of the Ohio House of Representatives in his official capacity, the Executive Secretary is ORDERED to submit a Supplemental Memorandum to the motion for summary judgment consistent with this Opinion within 15 days of its receipt. Plaintiff's Memorandum Contra on this issue will be submitted within 15 days upon receipt of defendant's Supplemental Memorandum Contra. In all other respects, the motion for summary judgment is DENIED.

IT IS SO ORDERED.

/s/ JOSEPH P. KINNEARY
United States District Judge

SPECIAL VERDICT OF THE UNITED STATES DISTRICT COURT

(Filed December 7, 1989)

Case No C-2-84-1865

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JANINE THOMPSON,
Plaintiff,

v.

IKE THOMPSON,
Defendant.

SPECIAL VERDICT

We the jury, being duly empaneled, do hereby find as follows:

Question No. 1

Did the defendant, under color of state law, deprive the plaintiff of the equal protection of the laws by subjecting her to "quid pro quo" sexual harassment such that the acts of harassment were the proximate or legal cause of plaintiff's injuries? (Yes) (No) Insert your answer on this line. Yes.

Question No. 2

Did the defendant, under color of state law, deprive the plaintiff of the equal protection of the laws by subjecting her to sexual harassment in the form of an

offensive work environment such that the actions creating this environment were the proximate or legal cause of the plaintiff's injuries? (Yes) (No) Insert your answer on this line. No.

Question No. 3

Did the defendant intentionally inflict severe emotional distress by extreme and outrageous conducts such that the conduct was the proximate or legal cause of the plaintiff's injuries? (Yes) (No) Insert your answer on this line. No.

Question No. 4

Did the defendant intentionally invade or intrude into the privacy of the plaintiff in a highly offensive manner such that the intrusion or invasion was the proximate or legal cause of the plaintiff's injuries? (Yes) (No) Insert your answer on this line. No.

Question No. 5

Did the defendant commit battery upon the person of the plaintiff by acting with an intent to cause offensive or harmful contact with the plaintiff, when an offensive or harmful contact actually occurred such that the offensive or harmful contact was the proximate or legal cause of the plaintiff's injuries? (Yes) (No) Insert your answer on this line. No.

If your answers to questions one through five were all "No," you need not answer the remaining questions. If, however, your answer was "Yes" to any one of the five preceding questions, then you must answer questions six and seven.

Question No. 6

What is the total amount of money damages needed, if any, to compensate Janine Thompson for the injuries she suffered as a result of all of Ike Thompson's conduct for which you held him liable? You may award compensatory damages only for the claims upon which the plaintiff prevailed by your answer of "Yes" to the questions above which correspond to those claims.
Enter the total amount on this line. $55,000.

Question No. 7

What is the total amount of punitive damages, if any, that you choose to award to Janine Thompson upon all of the claims for which you held Ike Thompson liable. You may award punitive damages only for the claims upon which the plaintiff prevailed by your answer of "Yes" to the questions above which correspond to those claims.
Enter the total amount on this line. $50,000.

Foreman/Forelady

DATE: _____

JUDGMENT OF THE UNITED STATES DISTRICT COURT

(Filed December 8, 1989)

Civil No. C-2-84-1865

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JANINE THOMPSON,
Plaintiff,

vs.

IKE THOMPSON,
Defendant.

JUDGMENT

This action came on for trial before the Court and a Jury, the Honorable Joseph P. Kinneary, Judge, United States District Court presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff Janine Thompson recover of the defendant Ike Thompson

> the sum of Fifty Five Thousand ($55,000.00) dollars as compensatory damages and the sum of Fifty Thousand ($50,000.00) dollars as punitive damages. A total of One Hundred Five Thousand ($105,000.00) dollars,

with interest thereon at the rate of 7.69% per annum as provided by law. Each party to pay their own cost of action.

Dated at Columbus, Ohio on December 8, 1989.

KENNETH J. MURPHY, CLERK
By (Illegible) ENTENMAN
Deputy Clerk

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed March 13, 1991)

Case No. C-2-84-1865

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JANINE THOMPSON,
Plaintiff,

v.

IKE THOMPSON,
Defendant.

OPINION AND ORDER

This matter comes before the Court to consider the motion of the defendant, Ike Thompson, for judgment notwithstanding the verdict, or, in the alternative, for a new trial. Fed. R. Civ. P. 50(b), 59. On December 8, 1989, the Court entered judgment for the plaintiff following the return of a special verdict by the jury. The jury found liability in favor of the plaintiff, in that, the defendant, acting under color of state law, deprived the plaintiff of her right to the equal protection of the laws by making submission to his sexual advances a condition for receiving job benefits or avoiding adverse employment actions. 42 U.S.C. §1983 (1982).

I.

Initially, the Court must address a procedural matter. The plaintiff asserts that denial of the defendant's motion for judgment notwithstanding the verdict is appropriate given the defendant's failure to move for a directed verdict at the close of all the evidence. Generally a court is precluded from entertaining a motion for judgment notwithstanding the verdict if the movant did not move for a directed verdict at the close of the evidence.[1] *Gutzwiller v. Fenik*, 860 F.2d 1317, 1330 (6th Cir. 1988); *Young v. Langley*, 793 F.2d 792, 794-95 (6th Cir. 1986), *cert. denied*, 479 U.S. 950 (1987); *see also* 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶50.08 (2d ed. 1989). Thus, a motion for a directed verdict is a prerequisite to a motion for judgment notwithstanding the verdict. Where, however, the trial court reserves its ruling on the movant's motion for a directed verdict, the movant's failure to renew his motion should not preclude the consideration of his judgment notwithstanding the verdict motion. *See Farley Transp. Co., Inc. v. Sante Fe Transp. Co.*, 786 F.2d 1342, 1346 (9th Cir. 1985); *Bohrer v. Hanes Corp.*,

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[1] This rule states:

> Whenever a motion for a directed verdict made *at the close of all the evidence* is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict.

Fed. R. Civ. P. 50(b) (emphasis added).

715 F.2d 213, 217 (5th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984), *cited with approval in Boynton v. TRW, Inc.*, 858 F.2d 1178, 1186 (6th Cir. 1988); *see also Gutzwiller*, 860 F.2d at 1331; *Miller v. Rowan Cos.*, 815 F.2d 1021, 1025 (5th Cir. 1987); *Ebker v. Tan Jay Int'l*, 739 F.2d 812, 823 (2d Cir. 1984).

Counsel for the defendant made a motion for a directed verdict at the conclusion of the plaintiff's case in chief pursuant to Rule 50(a). The Court then permitted the plaintiff to respond to the defendant's motion. The Court reserved its decision on the motion for a directed verdict; a decision as to the merits of the defendant's motion was never issued.

The Court's reservation on ruling on the motion for a directed verdict made at the close of the plaintiff's case may have been understood by defense counsel as suggesting that renewal of the directed verdict motion at the close of all evidence was unnecessary. The Court's reservation constituted, in effect, judicial notice that renewal of his motion was unnecessary to preserve the defendant's right to move for judgment notwithstanding the verdict. A denial of the defendant's motion for judgment notwithstanding the verdict would unjustly prejudice the defendant who may have reasonably relied on the Court's actions as implicitly suggesting that a second motion for a directed verdict was not required.

The Court's consideration of this motion notwithstanding the defendant's technical non-compliance with Rule 50(b) does not run afoul of the purposes of Rule 50(a). The defendant's motion for a directed verdict at the close of the plaintiff's case in chief placed the plaintiff on notice that he was challenging the sufficiency of the evidence. The plaintiff had ample opportunity to cure any defects in proof raised by the

defendant's motion for a directed verdict. Thus, to the extent the instant motion questions the sufficiency of the evidence, the motion is appropriately before the Court.

Turning to the merits of the defendant's motion, the defendant first argues that the jury verdict of damages in the sum of $55,000 for compensatory and $50,000 for punitives is excessive and unwarranted by the evidence produced at trial. The appropriate means to challenge the excessiveness or inadequacy of a verdict are a motion for a new trial and a motion for remittitur or additur. *Young*, 793 F.2d at 794; *Hahn v. Becker*, 588 F.2d 768, 771 (7th Cir. 1979) ("The only vehicle by which questions of excessiveness or inadequacy of verdicts can be submitted to the trial court is a motion for new trial."); *see also Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1452 (9th Cir. 1988). Accordingly, the Court will consider this issue in its discussion of the defendant's motion for a new trial.

The defendant next argues that the jury premised the liability of the defendant solely on the uncorroborated testimony of the plaintiff, testimony, the defendant contends, that conflicted with the testimony of all witnesses called at the trial. This fact coupled with the defendant's testimony in direct contradiction of the plaintiff's testimony, the defendant argues, demonstrates that the evidence is clearly in favor of the defendant. Assuming *arguendo* that the defendant is correct in his contention that the evidence clearly favors him, such a finding would be an insufficient basis alone for granting the defendant a judgment notwithstanding the verdict.

The Court is mindful of the standard of review that guides consideration of a motion for judgment notwithstanding the verdict.

> [A] judgment *n.o.v.* may not be granted unless reasonable minds could not differ as to the conclusions to be drawn from the evidence. The issue raised by a motion for a judgment *n.o.v.* is whether there is sufficient evidence to raise a question of fact for the jury. This determination is one of law to be made by the trial court in the first instance. In determining whether the evidence is sufficient, the trial court may not weigh the evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury. Rather, the evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in his favor. If, after thus viewing the evidence, the trial court is of the opinion that it points so strongly in favor of the movant that reasonable minds could not come to a different conclusion, then the motion should be granted.

Toth v. Yoder Co., 749 F.2d 1190, 1194 (6th Cir. 1984) (citations omitted); *see also Frost v. Hawkings County Bd. of Educ.*, 851 F.2d 822, 826 (6th Cir.), *cert. denied*, 109 S. Ct. 529 (1988).

In light of the "reasonable minds" standard set out above, the Court must deny the instant motion. The Court finds that reasonable jurors could reach different conclusions given the evidence offered at trial. Obviously, a case such as the one at bar would not have reached the trial stage unless there was indeed an genuine issue of material fact. And, admittedly the testimony in support of the plaintiff and defendant is in direct contradiction. The jury, however, as the trier of fact, is entitled to accept one party's version of the underlying facts over the other. In making this decision, it is the jury's responsibility and duty to consider the credibility of each witness and to determine the weight to be accorded his or her testimony. Here, the jury found

the plaintiff to be a credible and truthful witness. Her testimony coupled with that of Robbie Cromwell could certainly provide the basis for a jury verdict in favor of the plaintiff. Viewing the evidence in the light most favorable to the plaintiff, it is clear to the Court that there was ample evidence to support a conclusion contrary to the one now espoused by the defendant. Accordingly, the defendant's motion for judgment notwithstanding the verdict is without merit.

II.

The Court will now consider the defendant's motion for a new trial. It is well recognized that such a motion is addressed "almost entirely to the exercise of discretion on the part of the trial court." *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811, 816 (6th Cir. 1982) (quoting *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam)); *see also Logan v. Dayton Hudson Corp.*, 865 F.2d 789, 790 (6th Cir. 1989); *Gordon v. Norman*, 788 F.2d 1194, 1200 (6th Cir. 1986); *Whittington v. New Jersey Zinc Co.*, 775 F.2d 698, 700 (6th Cir. 1985) (per curiam).

The Court will first consider the defendant's argument that the evidence introduced at trial compels a verdict contrary to that found by the jury.

> In ruling upon a motion for a new trial based on the ground that the verdict is against the weight of the evidence, a district judge must compare the opposing proofs and weigh the evidence, and "it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence ***." . . . "However, [c]ourts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different

> inferences or conclusions or because judges feel that other results are more reasonable." Thus, while the district judge has a duty to intervene in appropriate cases, the jury's verdict should be accepted if it is one which could reasonably have been reached.

Duncan v. Duncan, 377 F.2d 49, 52 (6th Cir.), *cert. denied*, 389 U.S. 913 (1967) (citations omitted), *quoted in TCP Indus., Inc. v. Uniroyal, Inc.*, 661 F.2d 542, 546 (6th Cir. 1981). Here, just as the Court discussed in considering the defendant's motion for judgment notwithstanding the verdict, the jury's verdict was entirely reasonable. The defendant's contention in favor of his motion is premised on the argument that the jury should have rejected the testimony of the plaintiff and accepted that of the defendant. Further, defendant argues that it was improper for the jury to ignore the testimony of several of the defendant's witnesses, who in the opinion of the Court had reason to color their testimony in favor of the defendant. It was entirely reasonable for the jury to accept the testimony of the plaintiff and Robbie Cromwell and reject that of the defendant, Thomas Winters, and Melissa Valentine. Upon review of the record, the Court cannot conclude that the jury's verdict is against the clear weight of the evidence.

Finally, the Court considers the defendant's claim that the jury award of $55,000 in compensatory and $50,000 in punitive damages is unsupported by the facts presented at trial. The Court is inclined to agree with the plaintiff that sufficient evidence exist in the record to support a compensatory damage award of $55,000. The jury may have determined this amount upon finding the defendant sustained severe emotional harm as a result of the defendant's conduct or as a means for compensating her for loss in earnings associated with her loss in

employment. The Court also finds that the jury award of $50,000 in punitive damages is well supported by the record. The jury may have found the defendant's action to have been committed in a maliciously, wantonly, or oppressively manner. Accordingly, it is the Court's opinion that neither the compensatory or punitive damage awards appear to be grossly excessive or shocking to the conscience.

WHEREUPON, upon consideration and being duly advised, the Court finds defendant's motion for judgment notwithstanding the verdict and, alternatively, for a new trial to be without merit, and it is, therefore, DENIED.

IT IS SO ORDERED.

/s/ JOSEPH P. KINNEARY
United States District Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed July 30, 1991)

No. 90-3290

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JANINE THOMPSON,
Plaintiff-Appellee,

v.

IKE THOMPSON,
Defendant-Appellant.

ORDER

BEFORE: RYAN and SUHRHEINRICH, *Circuit Judges; and* SILER*, *Chief Judge, United States District Court.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

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* Hon. Eugene E. Siler, Jr. sitting by designation from the Eastern District of Kentucky.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ LEONARD GREEN
Clerk

UNITED STATES CONSTITUTION

Amendment 14

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1254(1)

§1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

29 C.F.R. §1604.11(a)

§1604.11 Sexual Harassment

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII.* Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by a individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

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* The principles involved here continue to apply to race, color, religion or national origin.

42 U.S.C. 2000e(f)

42 U.S.C. §2000e Equal Employment Opportunities

* * *

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

42 U.S.C. §2000e-2(a)

§2000-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. §1983

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Federal Rule of Civil Procedure 51

Rule 51. Instructions to Jury: Objection

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

(2)

No. 91-695

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

ISAIAH THOMPSON,

Petitioner,

vs.

JANINE THOMPSON,

Respondent.

Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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STATEMENT OF THE CASE

PROCEDURAL HISTORY

Plaintiff-Respondent Janine Thompson (hereinafter respondent or Ms. Thompson) filed this action on October 17, 1984 against petitioner State Representative Ike Thompson (hereinafter petitioner or Rep. Thompson) and Thomas Winters (former Executive Secretary of the Ohio House of Representatives). Respondent alleged, pursuant to 42 U.S.C. §1983, a denial of equal protection guaranteed by the Fourteenth Amendment to the United States Constitution. Respondent further alleged pendent state claims of assault, battery, invasion of privacy and intentional infliction of emotional distress.

On October 2, 1985, respondent was granted leave to file her amended complaint which added a defendant, the Ohio House of Representatives, and a Title VII, 42 U.S.C. §2000e, claim against all defendants, following respondent's receipt of a Right-to-Sue letter.

The trial court subsequently dismissed the Title VII claims against the defendants Ohio House of Representatives and Thomas Winters by order dated June 8, 1988 on the basis of the personal staff exemption, 42 U.S.C. §2000e(f). On August 22, 1988, the court modified its June 8, 1988 order and dismissed most of respondent's 42 U.S.C. §1983 claims against defendant Winters. The respondent voluntarily dismissed her remaining claim under 42 U.S.C. §1983 against Winters.

The case proceeded to a jury trial on December 4 through 7, 1989. The 12 member jury reached a unanimous verdict on December 7, 1989 holding petitioner liable for denial of respondent's right to equal protection under the Fourteenth Amendment on account of sex pursuant to 42 U.S.C. §1983. The jury awarded respondent $55,000.00 in compensatory damages and $50,000.00 in punitive damages. On December 8, 1989, the trial court entered judgment for respondent in accordance with the jury verdict.

On March 13, 1990, the trial court denied petitioner's motion for judgment notwithstanding the verdict or for a new trial, and petitioner appealed.

FACTUAL BACKGROUND

The case below was brought by respondent on the basis of repeated and outrageous sexual harassment by petitioner State Representative Ike Thompson. The evidence presented to the jury included numerous instances of sexual demands, threats, and verbal and physical assaults by petitioner against respondent.

In addition to Ms. Thompson's testimony, respondent proffered the testimony of two former employees of petitioner who had both experienced remarkably similar sexual harassment at the hands of the petitioner. Patricia Stephens, a former secretary to petitioner, and Noel Williams, a former legislative aide to the petitioner, were both prepared to testify regarding the sexual demands, insults, innuendoes and

physical conduct of petitioner, including Ms. Williams' termination after she complained (Excerpts at 5-10).[1]

The respondent, who is not related to petitioner, began working for the Ohio House of Representatives in May of 1983 (TR I-5, 13).[2] Rep. Thompson immediately inquired into Ms. Thompson's personal life when he interviewed her. He asked her if she was married or had any boyfriends. He said that he did not want other persons to have priority in her life because she would be expected to accompany him after office hours (TR I-12). Rep. Thompson stated in the beginning of respondent's employment that "he was responsible for me getting the job and that I owed him" (TR I-13).

Ms. Thompson went to work for petitioner as his legislative aide in May 1983. She managed his office, staff, and handled his constituent problems. She did writing for him, reviewed legislation and made reports on legislation coming before

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[1] "Excerpts" refers to the portions of the trial transcript not originally ordered by petitioner and consists of the respondent's proffer of evidence of other women who were sexually harassed by petitioner. "Excerpt Transcript" refers to the additional portion of the transcript consisting of opening and closing arguments and jury instructions.

[2] Reference to the trial transcript shall be designated by "TR" followed by the volume and page numbers.

the Transportation Committee, which Rep. Thompson chaired. She also attended Committee hearings (TR I-14, 16).

Rep. Thompson told Ms. Thompson during the first month of work that she was doing a good job (TR I-18). At the end of her probationary period, Ms. Thompson received a raise and Rep. Thompson told Mr. Winters that she was doing a good job (TR II-94). Rep. Thompson never complained to Winters about any problems with Ms. Thompson's work until after respondent complained about the sexual harassment (TR II-126).

Rep. Thompson began to subject Ms. Thompson to sexual harassment shortly after she started working for him. He often told Ms. Thompson how attractive she was and that she should not wear pants; he had an office rule against it because he liked to look at legs. He further informed respondent that she would be fired if she dated anyone in state government (TR I-18). On cross examination, respondent recalled how jealous Rep. Thompson became when men stopped by the office to talk with her (TR I-101).

A few weeks after respondent started her job, Rep. Thompson informed her that he wanted to review with her that evening the next day's committee work. He informed respondent she would accompany him to dinner (TR I-19). Ms. Thompson was not concerned at first, because she had worked with men on the road before and had often worked in restaurants and hotels (TR I-20).

However, the legislation respondent had brought with her was not discussed at dinner. After dinner, Rep. Thompson said he wanted to work in his room so he could watch a baseball game on television (TR I-19-20).

When they arrived in petitioner's room, he turned on the game, and to respondent's shock, undressed down to his underwear. He told her he wanted to get "comfortable" (TR I-20); he directed respondent to do likewise. She refused and sat in a chair (TR I-22). Rep. Thompson then grabbed respondent by the arms, pulled her on the bed, unbuttoned her blouse and bra, and fondled her breasts (TR I-12). Respondent resisted, wrestled free and demanded to be taken home (TR I-22-23). At no time did respondent consent to petitioner's outrageous conduct. Rep. Thompson never mentioned the legislation that entire evening (TR I-21, 24).

Ms. Thompson did not complain to anyone about Rep. Thompson's behavior for several weeks because she was humiliated and felt that she should have been able to handle the situation. Finally she confided in a long time friend of her family, Mrs. Robbie Cromwell, in whose house she was living, about what had happened (TR I-24).

The sexual harassment continued. On several occasions, Rep. Thompson summoned respondent into his office ordering her to close the door. He repeatedly tried to put his hands up her skirt or down her blouse. He continually made sexually

suggestive remarks, and said that he expected the two to have a romantic relationship (TR I-25). He tried to kiss respondent and wanted her to sit close to him in his office. At social events, he tried to hold hands with respondent. Ms. Thompson did not consent to any of this conduct (TR I-25, 26). Rep. Thompson's demands went so far as to require respondent to cut the hair out of his ears (TR I-28). On several occasions, Rep. Thompson called his Columbus office from Cleveland. During the conversations he informed respondent that if she did not go to bed with him, she would lose her job (TR I-25).

Rep. Thompson eventually started calling respondent at home at all hours of the night. He often called her in the middle of the night ordering her to meet him at the Clarmont Hotel where he was staying (TR I-27). Mrs. Cromwell overheard two of these calls. On one occasion, respondent asked Mrs. Cromwell to listen on the extension phone (TR I-154). Mrs. Cromwell heard Rep. Thompson tell respondent how much he liked her and that he wanted her body. Respondent informed Rep. Thompson that she only wanted to work for him and was only interested in doing a good job (TR I-155). Rep. Thompson responded that respondent's work was fine but that he was interested in her personally (TR I-155, 157; TR I-47-49).

Janine Thompson testified that she never saw Rep. Thompson touch any male employee of the Ohio House of Representatives in a sexual way (TR I-29).

Rep. Thompson also told respondent to accompany him on trips out of town. The first trip was to Sacramento, California a few months after respondent commenced her employment at the House of Representatives. Respondent informed Rep. Thompson that she did not want to go because of the sexual harassment that she had encountered, but he informed her that she had to accompany him (TR I-30).

Ms. Thompson consulted Tom Winters, Executive Secretary of the Ohio House of Representatives, about whether she had to go on the trip to California, relating to him the incidents at the Clarmont and the offensive conduct which had occurred in the office. She told him she did not want to go on the trip (TR I-36).

Ms. Thompson testified that Mr. Winters was noncommittal, not wanting to get personally involved. She felt that if Mr. Winters was concerned about her situation, he would have spoken with Rep. Thompson (TR I-36). Instead, Mr. Winters told the Respondent that the trip was not in her job description so she did not have to go. She told Rep. Thompson what Mr. Winters had told her, to which Rep. Thompson responded that she worked for him, not Tom Winters, and that if she did not go, she would not be working for him (TR I-37).

Respondent also sought help in alleviating the situation from John Thompson, another state representative who was a good friend of petitioner. John Thompson reported to respondent that he could get nowhere with the petitioner

because the petitioner was obsessed with having her (TR I-34).

Respondent's fears were confirmed upon her arrival in California. Petitioner met her in the lobby of the hotel, whereupon he immediately talked to the desk clerk about having her assigned the room next to his. That room was not available so respondent took one down the hall (TR I-38).

Rep. Thompson asked respondent to stop by his room when it was time to go to dinner. He met her at the door in his underwear and invited her in. Respondent, still thinking that she could handle the situation, went into the room. Petitioner again tried to coerce respondent onto the bed. He started kissing her. When she resisted, he said that she was not appreciative of the trip (TR I-39, 40).

When Ms. Thompson again informed Rep. Thompson that she was not interested in a romantic relationship, he suggested that they have oral sex. After this incident, respondent felt the situation was hopeless. She had been rude to petitioner, she had called him names, but he still persisted (TR I-41-42).

Upon her return to Columbus, the harassment continued. Respondent continued to resist petitioner's advances, but he kept telling respondent that she was not appreciative of him. He told her that she would have to leave, take a transfer or find another job (TR I-44).

By the fall of 1983, Ms. Thompson had talked to Tom Winters and other state representatives requesting their help in getting out of the petitioner's office (TR I-49). She repeatedly tried to get in to see Mr. Winters again but could not get an appointment until January, 1984 (TR I-55). She informed Mr. Winters that the sexual harassment was continuing and that she wanted to get out of the office (TR I-56). Mr. Winters wondered if she would take a caucus aide position. Respondent did not want the caucus aide job, because it was a demotion to an entry level position (TR I-56).

Mr. Winters acknowledged that Ms. Thompson was visibly upset when he saw her. She was emotionally upset, crying and trembling (TR II-70). The meeting created enough of an impression on Mr. Winters that he consulted his personal attorney as well as his wife, who is a labor lawyer (TR II-69).

However, Mr. Winters did not offer to take any action on behalf of Ms. Thompson (TR I-60). Instead, he wrote the respondent a letter that seemed more intent on protecting himself, confirming that he had met with respondent, and falsely stating that he had offered to investigate (TR I-62; respondent's Exhibit 6). To add insult to injury, Mr. Winters prepared a response letter, which he proposed that Ms. Thompson sign to acknowledge receipt of his letter (TR I-63; respondent's Exhibit 7). Respondent refused to sign this acknowledgement. Mr. Winters became angry at her refusal to sign the letter (TR I-63, 64).

Mr. Winters confronted Rep. Thompson about the respondent's complaints ten days after his January meeting with her (TR II-87). The petitioner was upset and told Mr. Winters that every time he asked respondent to do something, she would scream at him (TR II-87).

Despite meeting with Mr. Winters in January about the respondent's complaints of sexual harassment, Rep. Thompson continued to pressure respondent to take trips or spend weekends with him (TR I-67-69).

In March, 1984, following a dispute with petitioner over his demand that she spend the weekend with him, the respondent and petitioner decided to talk with Mr. Winters (TR I-72). Ms. Thompson reminded Mr. Winters about the harassment that she had previously complained to him about (TR I-72; TR II-89). The petitioner denied Ms. Thompson's accusations (TR II-77).

As a direct result of Rep. Thompson's sexual harassment, respondent was transferred to a caucus aide position in March 1984, a position with no duties. Ms. Thompson viewed the new position as a demotion or worse, because she had no substantive duties (TR I-75, 79). She did not go back to Mr. Winters because she felt she was being punished. In addition, many people stopped talking to her. Respondent resigned from her position in the House of Representatives in April, 1985 because of the treatment that she had received and damage to her career caused by petitioner (TR I-85, 95, 143).

At trial, respondent presented considerable evidence on damages. As petitioner is not challenging the jury's award of damages, that evidence is not relevant to this petition except for a few points. Respondent sought psychological counseling from Dr. Deborah Emm, a licensed psychologist. Respondent told Dr. Emm about the sexual harassment that she had suffered at the hands of Rep. Thompson. Dr. Emm diagnosed respondent as suffering from post traumatic stress disorder as a result of this treatment (TR II-21). Respondent was extremely anxious and visibly distressed, was experiencing considerable fatigue (TR II-15), was having trouble sleeping (TR II-23), and was suffering from eating disorders (Id.). Dr. Emm also testified that in her professional opinion, respondent was telling the truth (TR II-17). Dr. Emm testified that respondent's descriptions and condition closely matched what a psychologist would look for in a person who was a victim of sexual harassment (TR II-17).

SUMMARY OF THE ARGUMENT

This Court should deny the petition, which is based on what petitioner claims is an erroneous jury instruction, because the petitioner failed to raise any objection to the trial court's jury instructions. The failure to object to instructions precludes petitioner from challenging the instructions on appeal.

In addition, there was no error in the trial court's instructing the jury on sexual harassment. All federal appellate courts that have considered the issue have held that all forms of sexual harassment, including harassment that adversely affects the job (which has been labeled quid pro quo sexual harassment) is covered by the Fourteenth Amendment of the Constitution. There are no cases to the contrary. Therefore, there is no uncertainty among the circuits for this Court to resolve.

REASONS FOR DENYING THE WRIT

I. Petitioner Failed To Object To The Court's Jury Instructions On The Issue Of Quid Pro Quo Sexual Harassment And Is Therefore Precluded From Raising Any Assignments of Error Related To This Issue

As the Sixth Circuit Court of Appeals correctly recognized, petitioner cannot claim on appeal any defects in the trial court's instructions to the jury because he failed to raise objection to the instructions given by the court. Counsel for defendant stated that he had no objection to the jury instructions during a bench conference on the instructions (Excerpt Transcript at 88). Furthermore, the record shows that at no time prior to the trial did the petitioner raise the issue, by motion or otherwise, that respondent's claims of quid pro quo sexual harassment failed to state a claim upon which relief could be granted pursuant to 42 U.S.C. §1983.[3]

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[3] Contrary to petitioner's assertions, petitioner never raised the Constitutional issues discussed in his brief in the trial court. The Motion for Summary Judgment (which also did not raise the precise issues argued by petitioner herein) was made by defendants Winters and the Ohio House of Representatives. See Opinion and Order of the United States District Court, June 8, 1988, attached at

(continued...)

Rule 51, F.R.Civ.P., states that no party may assign as error the giving or the failure to give an instruction unless that party objects to the instruction before the jury retires to consider its verdict. See Pet. for Cert., A-41. This Court has adopted a strict interpretation of Rule 51. City of Springfield, Mass. v. Kibbe, 480 U.S. 257, 107 S.Ct. 1114 (1987). In Kibbe, this Court held that it should be reluctant to hear issues not raised below, particularly if the party arguing the issue did not object to jury instructions. This Court did not mention any exceptions to the rule nor did it indicate that the plain error doctrine applied.

The Seventh Circuit Court of Appeals held that "in civil cases a plain error doctrine is not available to protect parties from erroneous jury instructions to which no objection was made at trial." Deppe v. Tripp, 863 F.2d 1356, 1382 (7th Cir. 1988). See also, Williamson v. Handy Button Machine Co., 817 F.2d 1290, 1295 (7th Cir. 1987).

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[3](...continued)
Appendix A-5 of Petition for Writ of Certiorari. Petitioner never moved for Summary Judgment nor moved to dismiss. Likewise, the district court never issued an order that respondent could not proceed against petitioner on her Title VII claims, on the basis of the legislative staff exemption because petitioner did not raise it. Instead, respondent abandoned this claim.

The Sixth Circuit Court of Appeals has followed the strict language of Rule 51 in holding that the "failure to object [to jury instructions] waives the right to appeal from an incorrect instruction." Roberts v. City of Troy, 773 F.2d 720 (6th Cir. 1985).

In Young v. Langley, 793 F.2d 792 (6th Cir.), cert. denied, 479 U.S. 950, 107 S.Ct. 436 (1986), the court held that "generally where a party fails to object to an instruction this court will not consider that objection on appeal." Id. at 795.

Some courts have, however, created exceptions to the rule that failure to object precludes a litigant from challenging an instruction on appeal. The Sixth Circuit Court of Appeals noted that where an error in jury instructions is obvious and prejudicial, an appellate court may consider the matter in the interests of justice even if the complaining party has failed to object. Id. at 795. The Young court, despite setting forth the exception, refused to apply it to the defendant on appeal because the defendant, like petitioner herein, had not raised the issue by objection to the jury instructions nor in a motion for judgment notwithstanding the verdict nor a motion for a new trial.

Other courts have held that the plain error doctrine applies where there is an intervening change in the law, see Ratliff v. Wellington Exempted Village School Board of Education, 820 F.2d 792, 796 (6th

Cir. 1987); and Silor v. Romero, 868 F.2d 1419, 1421 (5th Cir. 1989).

Even if this Court were to create a plain error exception to the failure to object to instructions, the exception does not apply to the case at bar. As the Sixth Circuit Court of Appeals held in the instant case, even if there was error "it was not obvious". (Petition for Writ of Certiorari, A-4), because courts had already held that quid pro quo sexual harassment was covered by the Fourteenth Amendment. See Starrett v. Wadley, 876 F.2d 808 (10th Cir. 1989) and Volk v. Coler, 845 F.2d 1422 (7th Cir. 1988). Furthermore, there was no intervening change in the law between the time of the instruction and the time of appeal.

Finally, there can not be plain error, because federal courts have held the elements of sexual harassment contained in the instructions given by the trial judge are actionable under §1983.

II. "QUID PRO QUO" SEXUAL HARASSMENT CONSTITUTES AN ACTIONABLE CLAIM UNDER 42 U.S.C. §1983 WHERE, AS HERE, IT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. The Trial Court Instructed The Jury That Quid Pro Quo Sexual Harassment Required That The Harassment Be On Account Of The respondent's Sex, And The Jury So Found

The trial court in the case at bar instructed the jury on the elements of quid pro quo sexual harassment, without objection from petitioner:

> The second element of the plaintiff's claim is that Ike Thompson deprived her of a federal right by subjecting her to quid pro quo sexual harassment, thereby depriving her of the equal protection of the law. In order for the plaintiff to establish this second element, she must show five things by a preponderance of the evidence:
>
> First, that the plaintiff was a member of a class of persons protected by Section 1983 of Title 42;
>
> Second, the defendant subjected the plaintiff to

> sexual harassment in the form of unwelcome sexual advances or requests for sexual favors;
>
> Third, the harassment complained of was based on sex;
>
> Fourth, the plaintiff's submission to the unwelcome advances was a condition for receiving job benefits or the plaintiff's refusal to submit to the defendant's sexual advances resulted in adverse employment actions;
>
> Fifth, the defendant acted intentionally.

(Excerpt Transcript, at 48-49; see further elaboration by court at 49-52).

Petitioner ignores the abundant evidence, the explicit jury instructions, and jury verdict in attempting to rely on Huebschen v. Department of Health and Social Service, 716 F.2d 1167 (7th Cir. 1983).[4] In Huebschen, the court found that a female supervisor's treatment of a male employee was not sexual harassment, but resulted from the male employee's

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[4] In Huebschen, the court found that "the substantive basis of the 1983 claim is a violation of Title VII." 716 F.2d at 1170. Importantly, in the case at bar, plaintiff alleged and the jury found that the defendant's acts violated the Equal Protection Clause of the Fourteenth Amendment.

ending a consensual romantic relationship with the supervisor. Thus, the court found that the supervisor's actions were not based on the respondent's sex, but because of his having jilted her as a lover.

As the Seventh Circuit Court of Appeals later held, in a case petitioner ignored in his petition, Huebschen must be limited to the unique facts of that case. In Volk v. Coler, 845 F.2d 1422 (7th Cir. 1988), the court relied upon Bohen v. City of East Chicago, Ind., 799 F.2d 1180 (7th Cir. 1986) and stated that "discrimination and harassment against an individual woman because of her sex is a violation of the equal protection clause...Volk's sex is an immutable characteristic." (citation omitted, emphasis in the original) Id. at 845 F.2d at 1433.

Volk involved a factual setting similar to the facts in the instant case. The respondent in Volk brought claims under both Title VII and 42 U.S.C. §1983 for sexual harassment. Volk claimed that she rejected her supervisor's sexual advances, offensive touching, and crude remarks and displays, which resulted in a denial of promotion and an involuntary transfer. The court rejected the petitioner's attempts to rely on Huebschen stressing that Huebschen involved a consensual affair that ended in bitterness by the jilted lover:

> The facts in Huebschen, however, are easily distinguishable from those in this case. There, an office 'consensual romance'

> turned sour and the petitioner's conduct demonstrated an animus towards her 'former lover who had jilted her,' rather than general discrimination against the victim because of his sex. 716 F.2d at 1172. In addition, the Huebschen court distinguished its case from the facts in Woerner, supra. Woerner involved 'embarrassing and belittling remarks to the respondent female police officer, sexual advances made to her by a male petitioner, and harassment of male officers seeking to work with her,....' Id. There is no dispute that Volk immediately and continually rejected Tapen's alleged sexual advances, suggestive displays and crude remarks.

Id. at 1433.

The Sixth Circuit Court of Appeals distinguished Huebschen in the same way. See, Poe v. Haydon, 853 F.2d 418, 429 fn.6 (6th Cir. 1988), cert. denied, 109 S.Ct. 788 (1989); See also, Bertoncini v. Schrimpf, 712 F.Supp. 1336, 1341 (N.D. Ill. 1989); Skadegaard v. Farrell, 578 F.Supp. 1209 (D. N.J. 1984); and Woerner v. Brzeczek, 519 F.Supp. 517 (N.D. Ill. 1981).

Courts have repeatedly held that proof of discrimination against one individual is sufficient to state a violation of the equal protection clause so long as the respondent proves that she

was discriminated against on the basis of sex. In the case at bar, there was ample evidence that the basis for petitioner's conduct was respondent's sex. The jury found respondent suffered differential treatment due to her sex. Moreover, unlike Huebschen, petitioner did not offer any other reason for his conduct such as an attraction to some characteristic personal to Ms. Thompson. Instead, he denied Ms. Thompson's allegations.

B. Quid Pro Quo Sexual Harassment Constitutes A Separate Constitutional Violation Apart From Title VII

Petitioner concedes that sexual harassment violates the Equal Protection Clause of the Fourteenth Amendment, yet insists that one form of the harassment is outside its coverage, that is, the type that results in an adverse effect on one's job, or quid pro quo. Such a distinction is supported by no cases.

Specifically, the court in Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988), after engaging in an analysis of the development of sexual harassment claims under both Title VII and the Equal Protection Clause, held that quid pro quo sexual harassment constitutes a violation of the Equal Protection Clause. 864 F.2d at 896-97.

Similarly, the Tenth Circuit Court of Appeals recognized that sexual harassment constitutes a cause of action pursuant to the Equal Protection Clause, and held specifically that the petitioner's quid

pro quo firing of respondent violated §1983. Starrett v. Wadley, 876 F.2d 808 (10th Cir. 1989). Contrary to what petitioner argued, the Starrett court engaged in an analysis of the distinctions between hostile environment and quid pro quo sexual harassment holding the defendant county liable under §1983 for the termination of respondent, under a quid pro quo theory. Id., 876 F.2d at 820. See also, Bertoncini v. Schrimpf, supra and Skadegaard v. Farrell, supra.

In Volk v. Coler, supra, the respondent suffered adverse employment action as a result of her failure to submit to her employer's sexual demands, which was held to be actionable under 42 U.S.C §1983.

All of these cases involved quid pro quo sexual harassment, and all defendants in them were found to have violated the Equal Protection Clause. The touchstone of respondent's claims of quid pro quo sexual harassment is contained in the second and fourth subparts of the jury instruction. In addition to finding the petitioner's acts intentional, the jury found that petitioner subjected respondent to sexual harassment in the form of unwelcome advances or requests for sexual favors, the respondent's submission to which was a condition for receiving job benefits or the respondent's refusal to submit to the advances resulted in adverse employment actions. (Excerpt Transcript at 48, 49). The cases cited above all contain the elements to which Judge Kinneary referred as constituting quid pro quo sexual harassment.

1. Contrary To Petitioner's Assertion, Respondent's §1983 Claim Is Not Predicated On Title VII

Courts have held the constitutional right involved in this case, the right to be free of sex discrimination in the form of sexual harassment, does not derive from the proscriptions set forth in Title VII but rather from the Constitution. However, courts have held that it is appropriate to use Title VII analyses for equal protection claims. Sewell v. Jefferson County Fiscal Court, 863 F.2d 461, 466 (6th Cir. 1988), cert. denied, ___U.S.___, 110 S.Ct. 75 (1989); and Lipsett v. University of Puerto Rico, 864 F.2d 881, 897 (1st Cir. 1988) (court approved the use of Title VII analysis for claims under equal protection clause as well as Title IX). See also, Bohen v. City of East Chicago, Ind., supra, 799 F.2d at 1186.

Like the petitioner in the instant case, the defendant in Starrett, supra, a sexual harassment case, contended that a §1983 claim should not have been submitted to the jury, because it cannot be premised upon Title VII. The defendant's argument was rejected:

> ...plaintiff's Section 1983 claim is not predicated upon a violation of Title VII, but rather upon a violation of the First and Fourteenth Amendments. If a plaintiff can show a constitutional violation by someone acting under color of

> state law, then the plaintiff has a cause of action under Section 1983, regardless of Title VII's concurrent application.

Id. at 814 (citation and footnote omitted).

Petitioner's reliance on Day v. Wayne County Board of Auditors, 749 F.2d 1199 (6th Cir. 1984) is misplaced. After consideration of the Supreme Court's holdings in Johnson v. Railway Express Agency, 421 U.S. 454, 459, 95 S.Ct. 1716, 1719 (1975) and Great American Federal Savings & Loan Assn. v. Novotny, 442 U.S. 366, 99 S.Ct. 2345 (1979), the Sixth Circuit Court of Appeals held in Day that Title VII provided the exclusive remedy when the only §1983 cause of action was based upon a violation of Title VII. However, the court held that if the conduct violated the Constitution at the time of enactment of Title VII, the plaintiff may sue under 42 U.S.C. §1983. See also, Huebschen, supra. The court, relying on a section of the House Report on the 1972 Amendments to Title VII, stated that by extending coverage to state and local governments, the bill did not affect existing rights of public employees. Day v. Wayne County Board of Auditors, supra, 749 F.2d at 1204.

What distinguishes the instant case from Day, supra and Novotny, supra, is that those cases both involved claims of various types of retaliation, i.e. for filing Title VII charges (Day) and for support of female employee rights by a

male employee (Novotny). Protection from retaliatory acts by one's employer generally does not state a constitutional claim. The cause of action based upon retaliatory employer actions is created by Title VII itself.

Sexual harassment, unlike retaliation, violates constitutional rights in existence long before Title VII was enacted. As the court in Skadegaard, supra, stated: the plaintiff's Fourteenth Amendment constitutional rights are undeniably "independent" of those provided in Title VII and, in fact, pre-dated the creation of rights under its statutory scheme by close to one hundred years. Id., 578 F.Supp. at 1218.

In conclusion, none of the authorities cited by petitioner suggests that quid pro quo claims are only actionable under Title VII. Instead, quid pro quo sexual harassment on account of one's sex constitutes a violation of the Equal Protection Clause, a separate constitutional right predating 1972.

2. The Lack of Sexual Harassment Cases Reported Prior To 1972 Has No Bearing On Whether Sexual Harassment Constitutes A Claim Under The Equal Protection Clause

Petitioner argues in his petition that since there are no reported cases of instances of quid pro quo sexual harassment in violation of the Fourteenth Amendment prior to 1972, quid pro quo

sexual harassment violated no separate constitutional right or guarantee.[5] Petitioner's concession in his petition that hostile environment sexual harassment violates the Equal Protection Clause (Cert. Pet., at 10) belies his assertion that there must be reported cases prior to 1972 in order for there to be a pre-existing constitutional right.

Since 1972, courts have recognized that sexual harassment constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment in both the quid pro quo and hostile environment context. Although courts have not always referred to quid pro quo harassment by name, it is apparent that defendants, in cases brought under the Fourteenth Amendment adversely affected the plaintiffs' employment and therefore committed quid pro quo sexual harassment.

C. The Personal Staff Exemption To Title VII Has No Bearing On Petitioner's Liability For Acts Of Sexual Harassment Pursuant To 42 U.S.C. §1983

Petitioner implies in his petition that since Congress carved out the

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[5] Petitioner fails to mention that no sexual harassment cases were reported prior to 1972. Tompkins v. Public Service Electric & Gas Co., 422 F.Supp. 553, 556 (D. N.J. 1976) rev'd, 568 F.2d 1004 (3rd Cir. 1977) (in which the district court noted that the first sexual harassment case brought was in 1974).

personal staff exemption to Title VII (42 U.S.C. §2000e(f)), he should likewise escape liability for his wrongdoing under §1983.

This Court rejected an argument nearly identical to petitioner's herein in Davis v. Passman, 442 U.S. 228, 247, 99 S.Ct. 2264, 2278 (1979) where it held that the constitutional claim of discriminatory discharge brought by a federal employee was not precluded by the Title VII exemption of congressional employees. Congressman Passman contended that because of 717 of Title VII [42 U.S.C. §2000e-16(a)], exempting noncompetitive congressional employees from its coverage, Congress explicitly intended to prohibit an employment discrimination suit by the respondent. This Court stated that the respondent was nevertheless entitled to avail herself of remedies, including constitutional ones, other than those provided by Title VII:

> In a similar manner, we do not now interpret §717 to foreclose the judicial remedies of those expressly unprotected by the statute. On the contrary, §717 leaves undisturbed whatever remedies petitioner might otherwise possess.

442 U.S. at 247, 99 S.Ct. at 2278.

In addition, in Starrett, supra, the district court dismissed respondent's Title VII claim on the basis of the personal staff exemption, but left undisturbed her §1983 equal protection

claims. Although the court of appeals reversed the lower court's dismissal of her Title VII claim, nowhere in its discussion of the personal staff exemption does the court even imply that the exemption has any effect on §1983 remedies. Id, 876 F.2d at 821.

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari must be denied.

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No. 91-695

IN THE

Supreme Court of the United States

October Term, 1991

ISAIAH THOMPSON,
Petitioner,

vs.

JANINE THOMPSON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Respondent has stated that *quid pro quo* sexual harassment is actionable under 42 U.S.C. Sec. 1983 but fails to cite a single case to support this assertion. Respondent relies on the holdings of *Starrett v. Wadley,* 876 F.2d 808 (10th Cir. 1989), and *Volk v. Coler,* 845 F.2d 1422 (7th Cir. 1987). These cases, however, do not pertain to *quid pro quo* sexual harassment but to a "hostile work environment," which is proscribed by Title VII.

Quid pro quo sexual harassment is a type of sex discrimination unique to Title VII. It is not equivalent to a claim of sexual discrimination under the Equal Protection Clause.[1] It is true that Title VII analysis has been used by the courts to examine Constitutional claims. However, these cases do not hold that Respondent or the court may randomly interchange a Title VII claim and a Constitutional claim. A Section 1983 claim "should not proceed solely on the coattails of rights prescribed by Title VII." *Torres v. Wisconsin Dept. of Health & Social Services*, 592 F. Supp. 922, 928 (E.D. Wis. 1984), *affirmed*, 838 F.2d 944 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1587 (1989).

An equal protection violation requires proof of intentional discrimination by reason of membership in a particular class, not merely unfair individual treatment. The offender must have "selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Personnel Administrator v. Feeney* (1979), 442 U.S. 256, 279, 60 L. Ed. 2d 870. In the present case, there was no evidence at trial that Petitioner selected a particular course of action because of its adverse effects upon women as a class. Respondent's Brief is devoid of

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[1] The amendments to Title VII within the recently enacted Civil Rights Act of 1991 authorize remedial parity between a Constitutional claim of sexual discrimination and a Title VII claim. The amendments eliminate the disparity between the relief available to a party under the Constitution and that available under Title VII. This disparity is evidence of the basic dissimilarities between Constitutional claims and Title VII claims, which was recognized by Congress. Though much of that dissimilarity is now erased by the 1991 amendment, the distinction between the claims was in effect at the time of trial here and should have been recognized by the trial court. The trial court accomplished that which legislation was needed to accomplish. The court converted a Title VII claim into a Constitutional claim by merely requiring proof of intent, an implicit element in a Title VII claim.

reference to any such evidence.[2] The fact is that Respondent did not prove the necessary elements of a Constitutional claim but has obtained such relief in error.

In *Huebchen v. Dept. of Health & Social Services*, 716 F.2d 1167, 1171 (7th Cir. 1988), the Seventh Circuit recognized as had the Second and Fifth Circuits' that enforcing Title VII through Section 1983 should not result in enlargement of the limited substantive relief provided by Title VII itself. Yet, the trial court in the present case has improperly permitted such an enlargement. The trial court has permitted Respondent to recover Title VII relief though she is statutorily excluded from the class of claimants entitled to recover such relief.[4]

This Court has frequently spoken concerning application and exception to Fed. R. Civ. P. 51. This Court has clearly stated that when issues of fundamental fairness and justice appear, it will entertain an appeal from instructions when no objection was made. *St. Louis v. Praprotnik*, 485 U.S. 112, 99 L. Ed. 2d 107 (1988). *Barger v. Baltimore*, 616 F.2d 730 *cert. denied*, 449 U.S. 834 (4th Cir. 1980). Present counsel was not trial counsel for Petitioner and can offer no explanation for the failure to make the appropriate objection. Nonetheless, the trial court dealt extensively with the distinction between Title VII and Fourteenth Amendment discrimination but failed to properly instruct the jury. Unless this Court reviews this issue, the trial court's error will result in fundamental unfairness to Petitioner.

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[2] At page 2 of its Brief, Respondent refers to proffered testimony of former employees which was excluded from evidence on the basis of lack of relevancy. Accordingly, the evidence was not subjected to cross-examination or any other test of credibility.

[3] See *Rivera v. City of Wichita Falls*, 665 F.2d 531 (5th Cir. 1982), and *Carrion v. Yeshiva University*, 535 F.2d 722 (2nd Cir. 1980).

[4] See the exclusion of 42 U.S.C. Sec. 2000e(f).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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